

MAR 25 1949

CHARLES ELWONE GRIP  
CLERK

# Supreme Court of the United States

October Term, 1948

No. 656

JOHN M. DUNN and

DANIEL GENTILE alias  
DANNY BROOKS

*Petitioners*

*against*

THE PEOPLE OF THE STATE OF  
NEW YORK

*Respondent*

---

---

## RESPONDENT'S MEMORANDUM

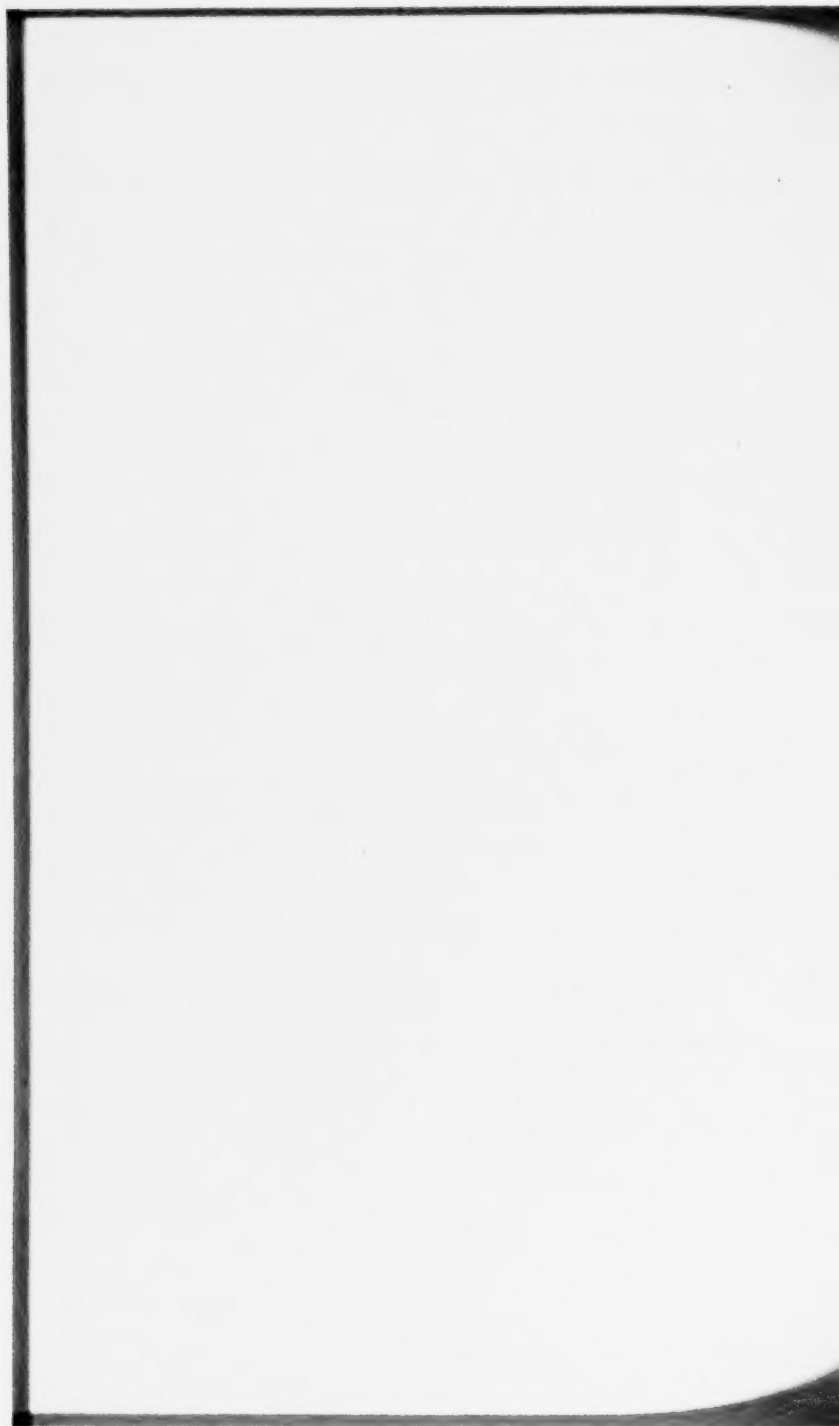
---

---

✓  
FRANK S. HOGAN  
*District Attorney*  
New York County

✓  
WHITMAN KNAPP  
Assistant District Attorney

WILLIAM HOPPEN  
Deputy Assistant District Attorney  
*of counsel*



## CONTENTS

	PAGE
Statement .....	1
Introduction .....	2
Trial .....	3
Prosecution .....	3
Defense .....	8
Hearing .....	9
Point I. Certiorari should be denied. ....	11
Appendix .....	A1*

---

\* "A," or "appendix," refers to pages in the appendix which follows this brief.

## II

### CASES

	PAGE
Commonwealth v. Dascalakis (1923) 246 Mass. 12, 140 N. E. 470 .....	A13
Hicks v. State (1937) 213 Ind. 277, 11 N. E. (2d) 171, cert. den. 304 U. S. 564 .....	11, A13
Hurtado v. California, 110 U. S. 516.....	A13
Loughridge v. State (1947) 202 Ga. 129, 42 S. E. (2d) 473....	A13
People v. Shilitano (1916) 218 N. Y. 161, 112 N. E. 733....	11, A13
People v. Weber (1906) 149 Cal. 325, 86 Pac. 671.....	A13
Pinson v. State (1946) 210 Ark. 56, 194 S. W. (2d) 190.....	A13
Sleator v. The King (Western Australia 1914) 16 W. A. L. R. 113 .....	A13
State v. Lee (1932) 173 La. 966, 139 So. 302.....	A13
State v. Upson (1925) 162 Minn. 9, 201 N. W. 913.....	A13
United States v. Johnson, 327 U. S. 106.....	11, A13

### STATUTES

#### New York Penal Law:

Sec. 1044 .....	1, A1
Sec. 1045 .....	A1

#### Revised Judicial Code:

28 U. S. C. (1948)	
Sec. 1257 (3) .....	2, A2

### III

#### APPENDIX

	PAGE
Statute authorizing conviction .....	A1
Statute invoked for certiorari .....	A2
Trial .....	A3
Declaration of Anthony Hintz .....	A3
Testimony of Anthony Tischen .....	A8
Hearing .....	A12
Testimony of defendant Sheridan.....	A12
Law and Cases .....	A13



# Supreme Court of the United States

October Term, 1948

No. 656

---

JOHN M. DUNN and

DANIEL GENTILE alias  
DANNY BROOKS

*Petitioners*

*against*

THE PEOPLE OF THE STATE OF  
NEW YORK

*Respondent*

---

## RESPONDENT'S MEMORANDUM

### Statement

On December 31, 1947, petitioners Dunn and Gentile, and defendant Andrew Sheridan, were convicted in the Court of General Sessions, New York County, of MURDER IN THE FIRST DEGREE (trial 24-5,\* 1218-20; New York Penal Law §1044, appendix 1). On January 19, 1948, they were

---

\* "Trial" refers to pages in the record of trial. "Hearing" indicates pages in the record of the hearing which was held on the motion for a new trial.

sentenced to death (trial 25-7, 1230, 1231-2, 1233-4). On July 16 the judgments were unanimously affirmed, without opinion, by the New York Court of Appeals [298 N. Y. 564, 81 N. E. (2d) 102]. On October 18 the trial court, with opinion, denied a motion by defendants Dunn and Gentile for a new trial (hearing 259, see *id.* 4-10, 260-9; N. Y. L. J., October 19, 1948, p. 833, col. 3). On February 24, 1949, the denial having been reviewed on reargument by the Court of Appeals, that court again affirmed the judgments without opinion (N. Y. L. J., February 28, 1949, p. 730, col. 1; DESMOND and DYE, JJ., dissenting). Defendants Dunn and Gentile now seek certiorari [petition pp. 1, 3, 4-5, brief p. 18; Revised Judicial Code, 28 U. S. C. (1948) §1257 (3), appendix 2].

## Introduction

Defendants were convicted for the murder of Anthony Hintz, a New York City longshoreman. Defendant Sheridan later sought to exculpate his co-defendants, who moved for a new trial on the basis of the exculpation. The trial court held a hearing on this motion, at which defendants Dunn and Gentile offered the testimony of Sheridan, and that of other witnesses. Their only claim here, one specifically considered by the Court of Appeals, is that the State courts committed constitutional error in refusing the new trial (petition pp. 1-5, brief pp. 7-18).



**TRIAL****Prosecution**

At about 7:40 a.m. on January 8, 1947, on the second floor landing of an apartment house at 61 Grove Street in New York City, defendants John M. "Cock-eyed" Dunn, Andrew "Squint" Sheridan, and Daniel Gentile, alias "Danny Brooks," lay in wait for Anthony M. Hintz, a hiring stevedore of the Manhattan waterfront (trial 411-2, also *id.* 219, 281-2, 389, 391, 451, exhibits 3, 17A, J; *cf.* hearing 27, 30, 41-2, 78-9, 171, 175, 178-81, 199, 212, exhibits 5, 8; appendix 3-5, 9-10, 12). About two weeks prior to this rendezvous, defendant Dunn had appeared down in Florida where defendant Sheridan was staying with his family, tried to see him and, failing to find him home, left word where Sheridan should come to see him (trial 766-71, also *id.* 776-7, 944; *cf.* hearing 24, 119, 141, 143, 209; appendix 10-11). About a week before it, after having made necessary family arrangements, defendant Sheridan took the train North (trial 772-3, also *id.* 782-3, 944; *cf.* hearing 25, 136-7, 144, exhibit 3; appendix 9-11, 12).

On the morning in question, as defendants waited for Hintz, a car containing his younger brother drew up in front of the building, to take Hintz to work (trial 282-3, also *id.* 162-3, 172-3, 174, 186, 305-7, 309, 310, 389, 411, 505-

7, exhibits 11, 16; *cf.* hearing 65, 67, 164, 184-5; appendix 4). The driver got out, went up to the front door, and rang Hintz' buzzer to let him know that he was waiting (trial 506-7, also *id.* 186, 283, exhibits 11, 16; *cf.* hearing 67, 184-5). As Hintz left his third floor apartment and came down the stairs, he came face to face with the three defendants (trial 389-92, 411-4, also *id.* 186-7, 238-40, 451, exhibits 3-6, 17, 17A, J; *cf.* hearing 30, 70, 198-9, exhibits 5, 8; appendix 3-7, 12). Defendant Dunn, referring to Hintz by an obscene epithet, stated that they should kill him (trial 413, also *id.* 638-9, *cf.* hearing exhibit 5; appendix 6).

Hintz was on the lower steps leading down to the landing, with the sun shining through a frosted glass window at his back, and with a hall light over the heads of the three defendants (trial 339-42, 412, 564, also *id.* 170-1, 391, 392, exhibits 3, 4, 6; *cf.* hearing 30, 198-9, 201, 212; appendix 4-5). While defendants Sheridan and Gentile stood by, defendant Dunn fired two shots into Hintz at a range of several feet, and Hintz fell (trial 411-3, also *id.* 89-96, 155-7, 166-7, 187-8, 196-7, 240, 390-1, 442, 451, 630-4, 789-90, 813-7, 820-1, 823-4, 964, exhibits 1-3, 18-24, 32-33; *cf.* hearing 30, 70, 73, 77, 212-4, exhibit 5; appendix 3-7, 9-11, 12).

Defendant Sheridan immediately started to run up the stairs which led to the roof of the building, and defendant Dunn began to follow, but Hintz grabbed Dunn by the leg (trial 412-3, also *id.* 390-1, 451, exhibits 3, 4, 6, 7, 9, 10, 12, 15, 17A; *cf.* hearing 30, 70, 199, 200-1, 212-3, exhibit 5; appendix 5, 10-11, 12). Defendant Dunn freed himself after firing three or four more shots into Hintz' body, and hitting him in the mouth (trial 412-3, also *id.* 89-96, 155-7, 166-7, 187-8, 196-7, 240, 451, 630-4, 789-90, 812-7, 820-1, 823-4, 964, exhibits 1-3, 18-24, 32-33; *cf.* hearing 30-1, 70-1, 73, 77, 212-4, exhibit 5; appendix 5, 10-11, 12).

Defendants Dunn and Sheridan fled over the roofs and down through an adjoining building to the next street, where a car was parked with a number of men in it (trial 344-6, 351-6, also *id.* 346-8, 358-60, 362-3, 390, 785-7, exhibits 6-10, 12-16, 17A; *cf.* hearing 24, 26-7, 31-2, 34-6, 38-40, 42, 69-70, 74-6, 77-9, 80, 83, 167-8, 214-6, exhibit 5; appendix 5-6, 12). Defendant Gentile fled down the stairs to the front, where he was seen coming out by Hintz' brother (trial 283-4, also *id.* 175, 297-8, 301, 304-7, 308-11, 312, 315-7, 319-20, 329, 333-8, 379, 390, 412-4, 490-1, 517-8, 520, 522-3, 525-6, 867-8, exhibits 11, 16, J; *cf.* hearing exhibit 8; appendix 5-7, 8-9, 12).

Immediately after the shooting, Hintz cried out the name of defendant Dunn, and Hintz' wife came out into the hallway (trial 187-9, 244-5, also *id.* 238-43, 390-2, 411-3, 960, exhibits 5, 6, 17, 17A; *cf.* hearing 255-8; appendix 3-6, 8-9, 12). She saw him, went back to call the police, and returned to the hall, where her husband was bleeding on the landing (trial 191-2, also *id.* 90-5, 189-91, 245-8, 250, 789-95, 808-9, 840, 960, 962-9, exhibits 3, 4, 5, 6, 17, 17A; appendix 5).

After neighbors came out and helped him upstairs, she guided him into the bathroom, and washed the blood off his face (trial 192, 196-7, also *id.* 247-53, 840-3, 847-51, exhibits 3-6, 17, 17A). As she knelt before him, Hintz told her that he was dying, and that he had been shot by defendant Dunn (trial 192-3, 197, also *id.* 218-9, 390-2, 411-3 446-51, 960, exhibit 17; *cf.* hearing 255-8, exhibits 5, 12; appendix 3-6, 8, 12).

When police came, however, Hintz repudiated this early identification, and both at the apartment and later that day in a stenographic statement to them at the hospital, denied that he knew who had shot him (trial 446-51, 852, 854, 866, exhibit G for identification, also trial 440, 455, 508-11, 867).

After having been spoken to by a police lieutenant who was an old friend from the docks, Hintz subsequently gave police two dying declarations, completely describing the shooting, and implicating all three defendants (trial 389-92, 410-4, also *id.* 218-9, 220-1, 422-3, 424-5, 460-1, 513-5, 516-7, 518-22, 524-5, 526, 529-30, 532-3, 534, exhibits 28-30 for identification; *cf.* hearing 255-8; appendix 3-7, 8-9, 12).

Defendant Dunn was caught by police at about 10 on the morning of the shooting, in his nearby union office (trial 365-7, also *id.* 190-2, 200-2, 371-6, 419-21, 442-5, 516-7, 545-6, 547-50, 566, 579-81, 586-91, 597-9; *cf.* hearing 32-3, 80, 189, 201-3, 226-31, exhibit 5; appendix 4, 8-11, 12). When told that he was going to be confronted with Hintz, defendant Dunn protested (trial 367, also *id.* 392-3, 424-5, 462, 622, Dunn opening 78, exhibit 29 for identification; *cf.* hearing 255-8, exhibit 5; appendix 8-9, 12).

Defendant Sheridan fled back down to Florida, was arrested there on the 24th, and returned to New York for trial (trial 429-31, 785-8, also *id.* 352-6, 363, 425, 427-8, 468-87, 623, 773-4, 783-4, 945, exhibits W, X; *cf.* hearing 33-6, 80-3, 133-5, 187, 194, 196-7, 210, exhibit 11; appendix 5-6, 8-11, 12).

Defendant Gentile surrendered about two months later and, when asked about the shooting, inferentially admitted presence at the scene (trial 546-7, also *id.* 295-6, 299-304, 334-7, 427-8, 429, 491-3, 502, 520, 522-3, 525-6, 540-1, 543, 551-2, 553-61, 623, 628, exhibits 11, 16, J; *cf.* hearing exhibit 8; appendix 5-7, 8-9, 12).

While confined in jail, defendant Dunn spoke to an informer, and indicated guilt (trial 630-4, also *id.* 367, 389-92, 411-3, 622-3, 627-8, exhibits O, R; *cf.* hearing 255-8, exhibit 5; appendix 3-7, 8-11, 12).

### **Defense**

None of defendants testified at trial. Defendant Dunn offered an alibi by his family, and defendant Sheridan introduced evidence to show that his departure for Florida, after the shooting, had been without attempt at concealment (trial 933-45, see *id.* 873-932, exhibits S, W, X).

## Hearing

After their convictions had been affirmed, and their requests for stay of execution denied, defendant Sheridan made a death-house exculpation of his two co-defendants (hearing 11-43, see *id.* 260). Defendant Sheridan claimed that he had engineered the entire shooting through two other men, neither now available, and denied that either he or his co-defendants had been present at the shooting (hearing 11-42, see *id.* 12, 19, 48-50, 110, 222, 249-51, exhibits 1, 4, 6, 7; appendix 12).

Defendant Sheridan subsequently testified at the hearing held by the trial judge on the motion of his co-defendants for a new trial (hearing 48-232). Defendant Sheridan denied in particular that he had ever seen defendant Dunn while they both had been down in Florida, or that he had ever discussed the shooting with defendant Dunn (*ibid.*, see hearing 50, 83-4, 109, 129, 132, 218-9; appendix 12).

The prosecution introduced the rail ticket envelope of defendant Sheridan's pre-shooting trip North, on the back of which had been written the New York phone number of defendant Dunn (hearing 245-8, exhibit 3, also hearing 136-7, 140).

Defendant Sheridan, apparently having forgotten the existence of the envelope, was speechless (hearing 137-8, also *id.* 139-44, 207-9, exhibit 3).

The trial judge concluded that Sheridan's exculpation was false, and denied the new trial (hearing 259, see *id.* 268-9).



**POINT I****Certiorari should be denied.**

Defendants claim that the court erred in denying the new trial (petition pp. 1-5, brief pp. 7-18). This is without merit. Their guilt was fully established, and the denial presents no constitutional issue [see Hearing *supra* pp. 9-10; *cf.* trial 188, 197, 218-9, 283-4, 390-2, 411-4, 622, 627-8, 630-4, 960, appendix 3-11, Trial *supra* pp. 3-8; also *United States v. Johnson*, 327 U. S. 106, 111-113; *Hicks v. State* (1937) 213 Ind. 277, 302-304, 11 N. E. (2d) 171, 182, cert. den. 304 U. S. 564; *People v. Shilitano* (1916) 218 N. Y. 161, 180-181, 182, 112 N. E. 733, 739-740; Law and Cases, appendix 13].

**Certiorari should be denied.**

Respectfully submitted,

FRANK S. HOGAN  
*District Attorney*  
New York County

WHITMAN KNAPP  
Assistant District Attorney

WILLIAM HOPPEN  
Deputy Assistant District Attorney  
*of counsel*

March 1949

## **APPENDIX**

### **Statute authorizing conviction**

#### **NEW YORK PENAL LAW**

##### *§1044. Murder in first degree defined.*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; \* \* \*

\* \* \*

##### *§1045. Punishment for murder in first degree.*

Murder in the first degree is punishable by death \* \* \*.

**Statute invoked for certiorari**

**UNITED STATES CODE**

**JUDICIARY AND JUDICIAL PROCEDURE**

*§1257. State courts \* \* \* certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \*

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. [28 U. S. C. (1948) §1257 (3)]

**Trial**

*Herman Schmarion, a stenographer in the New York County District Attorney's Office, testified that on January 13, 1947, Anthony Hintz made the following statement (trial 410-4, exhibit 30 for identification):*

"Q. [William J. Keating, Assistant District Attorney, New York County] What is your name? A. Anthony Hintz.

"Q. How old are you, Anthony? A. Forty-three.

"Q. Where do you live? A. 61 Grove Street.

"Q. How do you feel, Anthony? A. Lousy.

"Q. Do you feel that you are going to die? A. Jesus Christ I ain't feeling so good.

"Q. Have you given up all hope of recovery? A. I don't know, I don't think I have a chance.

"Q. Have you had the priest? A. Yes, a couple of priests.

"Q. Did you have the last rites of the church? A. Yes, several times.

"Q. Are you a Catholic, Anthony? A. Yes.

"Q. Do you tell me now that you have given up all hope of recovery, is that right? A. Well, yes, all hope of recovery. I don't feel good at all, I feel lousy.

"Q. Andy, who shot you on Wednesday morning, January 8th, at 61 Grove Street? A. Johnny Dunn.

"Q. Who was with him? A. Danny Brooks [Gentile].

“Q. Who else? A. Andy Sheridan, the three of them were there.

“Q. Who fired the shot? A. Dunn, he done well, too.

“Q. How many shots did he fire at you? A. Six.

“Q. What time was this? A. About 18 minutes to eight in the morning. I was going to work, which I have to go to work every morning between 20 to eight and 8 o'clock.

“Q. When did you first see these three men on Wednesday morning? A. When they started shooting at me.

“Q. Where were they when they started shooting at you? A. I don't know, I can't say.

“Q. Was it inside the building? A. Yes.

“Q. What floor? A. Between 3-A, I was caught between 3-A and 2-A.

“Q. On the stairway, on the landing between the second and third floor? A. The stairs come down like this, right? My house is 3-A, right?

“Q. Right. A. Then you go down, you make a turn, there is a platform.

“Q. That is half way down to the floor below? A. Wait a minute, 3-A, I am the very first apartment, that would be the last apartment moving out, understand what I mean? It is hard for me.

“Q. You mean the one right near the stairs? A. The one right near where Mike Sullivan lives, he is on the first floor, but I live on the next floor. I was coming down, they had that banister, they were shooting like this and you can't get around it, that is the only reason I ain't dead, I guess.

"Q. How close was he to the banister? A. About that far away.

"Mr. Keating: Indicating two feet.

"Q. Who was that, Andy? A. Dunn. Then somebody else popped out this way.

"Q. Where was Andy Sheridan standing when the shots were fired? A. I come down, the glare of the light gets you, you don't see right away. I went down the stairs, they popped out bang, bang. I made a leap at him.

"Q. Who did you make a leap at, the man with the gun? A. Yes. I fell down and he pegged two more shots at me. Somebody jumped over me and went upstairs and the other guy went downstairs and Dunn went upstairs.

"Q. How did Dunn get upstairs? A. He jumped over me.

"Q. When did he fire the second two shots? A. Oh, they were all practically in a couple of seconds.

"Q. But were you standing up or lying down? A. I could not get up no more.

"Q. How many shots were fired at you while you were lying down? A. Four.

"Q. What happened while Dunn was jumping over you? A. I tried to grab him, I pulled one leg down, he got away. I was too weak, he hit my mouth.

"Q. Were there any more shots fired at you while Dunn was jumping over you? A. He pegged about six shots altogether, it was very cold, I will tell you that.

"Q. Who was the fellow who went downstairs? A. Danny Brooks.

"Q. How long have you known Danny Brooks? A. About eight or nine years, 12 years, something like that.

"Q. Who was the fellow who ran upstairs first? A. Sheridan, the guy with the glasses.

"Q. What kind of glasses? A. He had them down over his nose and grayish blueish suit.

"Q. What kind of glasses were they, Andy? A. Thick glasses, very thick.

"Q. Who was the second man to run upstairs after the shots were fired? A. Dunn. The other fellow went out the front way.

"Q. Andy, before these shots were fired did any of these three men say anything to you? A. 'Kill the rat \* \* \*, kill him, and kill the rat \* \* \* brother of his.'

"Q. Who said that, Andy? A. Dunn.

"Q. Did anybody else say anything besides Dunn? A. No.

"Q. Did either Danny Brooks or Andy Sheridan say anything to Dunn? A. No, they did a hell of a lot in a few seconds, I can tell you, a lot.

"Q. Is Brooks Danny's right name? A. No, I don't know what his name is, Danny Brooks, that is all I know.

"Q. He is known in the neighborhood by that name, is that right? A. Yes.

"Q. But that is not his right name, is that right? A. Yes.

"Q. What nationality is he? A. Italian, I think.

"Q. Can you describe him to me, Andy? A. About 5 feet 6, nice-built fellow, curly hair, with glasses.



"Q. Does he wear glasses all the time? A. Mostly all the time.

"Q. Light or black hair? A. Black hair. Let me go, will you, please? I am sick as a dog. Come back later on, please.

"Q. All right, that is all now, Andy. A. Yes, I am sick.

"6 P. M."

*Anthony Tischon, a former tier-mate of defendant Dunn in Tombs Prison, testified concerning certain conversations which he had with defendant Dunn\* (trial 622-3):*

Q. [George P. Monaghan, Assistant District Attorney, New York County] Give us all the conversation. A. [Tischon] After I explained what I was arrested for, I, of course, turned and asked him what he was arrested for.

Q. What did he say? A. He says for the Hintz killing, and I thought he meant the Hines killing, due to the fact that I was acquaintance of Jimmie Hines, I figured it was possible maybe Jimmie Hines was killed, and he said no, the Hintz killing. I asked him who Hintz was, and he says, "Some . . . that I had trouble with." I asked him who was he arrested with. He said, "Andy Sheridan" and some fellow Danny. I can't remember the man's name.

Q. You don't remember the third one he said he was arrested with? A. Danny, that's all I remember. I asked him where they were, and he told me that Andy was in Federal detention and that this fellow Danny was in the Bronx prison.

. . .

(trial 627-628):

Q. Now, will you proceed? A. I told him if, —how he felt about the case and everything, his own particular case, and he says, well, he say[s] he was not worrying about it, that there is very little they could do, that there is no eye-

---

\* This testimony was admitted only as relevant to the guilt of defendant Dunn (trial 628, 631, 632, 633).

witness or anything to the crime, but it is a very bad inconvenience of laying around the Tombs and things like that. So then we got back to my case again and it was going off and on for a while like that and I told him, I say for him not to let me down, if I was to be used as a witness that he would go through with his bargain and he said I needn't worry about it. And I asked him how he felt about the defendants, were they—and the general trend of the thing in prison, would he stand up, and he said he was not worried about Andy, but that he had a little doubt in his mind about this fellow Danny.

Q. About standing up? A. Yes, sir.

• • •

(trial 630-1):

Q. All right, go ahead now and tell us. A. And I had a few, maybe a half hour or so before going to court and I was in need of a shave, and I spoke to Dunn, he gave me the money for the shave. There was a few fellows up ahead of me so we sat down and waited for the time for me to be called and I started a discussion with him concerning his own case and I told him, I says, I asked him, I says—not the exact words—but I brought out, does it look bad, or anything like that? Well, he says, "I can't, you know—" as he told me the day before, he said, "It is just the inconvenience being in here, that there was no actual eyewitness" and we got led back some way or other, Sheridan's name come into this conversation and I asked him if that was the Sheridan I knew.

• • •

Q. Well, you had a discussion about a Sheridan and after your discussion what did he say? A. After the discussion about Sheridan I spoke to him and I complimented

Sheridan, I says that everybody thought a lot of Sheridan, and this and that, and he—

Q. Well, what did Dunn say? A. He told me, he says, if it was not for that \* \* \*, he says, "I would not be here," and I asked him what he meant by that, did the man inform on him or anything like that? He says, "No, the bum did not go through with his bargain." And I asked him what he meant by that.

\* \* \*

(trial 632-3):

Q. Proceed. A. He said, "If it was not for that—" pardon the expression—If it wasn't for that \* \* \* he would not be here. And I asked him—

\* \* \*

Q. And what did he say? A. Can I go on with the story?

Q. Yes, from where you left off. You need not repeat. A. That he did not do the shooting he was supposed to do, and I asked him, "Why, was the guy yellow, or something like that?" He says, "No, what, are you nutty or something?"

Q. He said, "No, he was not"?

The Court: No, he wasn't what?

Mr. Monaghan: Wasn't yellow.

Q. Then what did you say? A. So I asked him, well, what excuse could he have given? So he told me—

\* \* \*

Q. Yes. A. And then he—so he told me that the pistol did not go off, or something, did not shoot.

\* \* \*

**A11**

(trial 634):

Q. Then what did he say? A. So I followed him, well, things like that do happen, and he says, The pistols that McGrath gave him were strictly no toys, he would not give nobody no toys.

## Hearing

*On October 6, 1948, at the hearing held by the trial court, defendant Sheridan testified in support of his co-defendants' motion for a new trial (hearing 49-50):*

Q. Now, were you present when Andrew Hintz was shot on January 8, 1947, at 61 Grove Street, in the City of New York, at about twenty minutes to eight? A. No, I was not present.

Q. Did you partake in the actual shooting of Mr. Hintz? A. No, I was not.

Q. Did you plan the shooting and killing of Mr. Hintz? A. That I did.

Q. And who planned it with you? A. Just John Duff and Jeff Le Porte.

Q. And Jeff Le Porte? A. Yes.

Q. Did anybody else plan that murder with you. A. No, sir.

Q. Did the defendant, John Dunn, plan it with you? A. No, sir.

Q. Did the defendant Gentile plan it with you? A. No, sir.

Q. Did you direct the killing of Mr. Hintz? A. That's correct.

Q. Did the defendant Dunn have anything to do with that? A. No, sir.

**Law and Cases**

In *People v. Shilitano* (1916) 218 N. Y. 161, 180-181, 182, 112 N. E. 733, 739-740, a motion for a new trial was held properly denied on the basis of a finding that the new evidence was false.

In *Hicks v. State* (1937) 213 Ind. 277, 302-304, 11 N. E. (2d) 171, 182 [*cert. den.* 304 U. S. 564], involving another such motion, the court held that its denial rested within the discretion of the trial court.

In *United States v. Johnson*, 327 U. S. 106, 111-113, another such case, the Court held that the denial, supported by evidence, presented no reviewable issue.

*Cf. Pinson v. State* (1946) 210 Ark. 56, 61-62, 194 S. W. (2d) 190, 192-193; *People v. Weber* (1906) 149 Cal. 325, 349-350, 86 Pac. 671, 681; *Loughridge v. State* (1947) 202 Ga. 129, 130-132, 42 S. E. (2d) 473, 474-475; *State v. Lee* (1932) 173 La. 966, 971, 139 So. 302, 303; *Commonwealth v. Dascalakis* (1923) 246 Mass. 12, 32-33, 140 N. E. 470, 479; *State v. Upson* (1925) 162 Minn. 9, 16, 201 N. W. 913, 915; *Sleator v. The King* (Western Australia 1914) 16 W. A. L. R. 113, 117-119. See, also, *Hurtado v. California*, 110 U. S. 516, 533-534.